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No. 179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

GENERAL OUTDOOR ADVERTISING CO., INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

SPAULDING GLASS
135 South LaSalle Street
Chicago 3, Illinois
Attorney for Petitioner.

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The opposition brief of the United States, respondent herein, raises a new question which goes beyond the questions and reasons given in the petition for granting the writ of certiorari to the United States Court of Claims, as well as new matters related to the questions presented by the petition on file to which brief reply should be made.

The writ should issue for the further reason that the decision below is in direct conflict with the principles of law enunciated in the following cases:

Rosenman v. *United States*, 323 U.S. 658.

United States v. *Dubuque Packing Company*, 233 F. 2nd 453, 8 Cir., (1956).

Thomas v. *Mercantile National Bank at Dallas*, 204 F. 2nd 943, 5 Cir., (1953).

Lewyt Corporation v. *Commissioner*, 215 F. 2nd 518, 2 Cir., (1954).

Infra, Sec. 4, pages 7-15, inclusive.

The prior petition for writ of certiorari, denied, covered two issues, viz.: Value of Goodwill determinable under Section 718(a) 2 of the Code and the Amended Claim of April 3, 1950 for 1944, not only the latter as mentioned. (Br. 3) The issues here are new. (Pet. p. 2), (Reply pp. 7-15).

1.

Respondent says there is no justification in logic, in the language of Section 322(b) of the 1939 Code or in this Court's opinion in the *Flora* case to invoke the principles thereof as petitioner expressed in its petition. (Br. 7—Pet. 5-8)

What would be the sense of filing a claim for refund under Section 322(b) of a part payment of an expected or assessed "tax" before final payment if it would not hold up in court as a "stated claim upon which relief could be granted"? It would be a useless act. It is logical and follows legally; to expect the Commissioner of Internal Revenue to deny and reject all such future claims, if *Flora* is affirmed upon rehearing.

Assuming, *arguendo*, in this case, that the $225,000 in question constituted a partial payment of a "tax," (instead of a payment on account in respect of a tax, which petitioner vigorously contended it to be in the court below) it is submitted that *Flora* has decided that Section 322(b) must be construed to mean that the future event of full payment redefines the time when the limitation period of two years for filing refund claims shall begin to run. Under

the decision the limitation period begins to run two years from the time when the "*full tax*" defined as the "*tax*" for a taxable period is paid. Hence, in this case, said limitation period, (as applied to the $225,000 "tax" payment) began to run on September 2, 1948, the final payment date for 1944 and the April 3, 1950 refund claim is timely to recovery without limitation. To put it another way, the sum in question is the payment of "tax" within the two-year period prior to April 3, 1950, and as such would be recoverable. This is the view of the *Flora* decision expressed by Counsel representing *Flora* in the Reply to the Solicitor General's Memorandum in Opposition to Petition for Rehearing (pp. 11-14). The question, therefore, is one before the Court to decide. Quoting from page 12, first paragraph, it will be seen that the Limitation Period on Claims for Refund is there involved:

> "It seems logical that, in fixing a period of limitation, Congress would sieze upon a date which coincided with the accrual of the cause of action. It is not reasonable to presume that Congress intended the date of payment of a subsequent assessment to start anew the running of the statute of limitations for filing a claim for refund of a prior collection. The effect of such a construction is to date the limitation period from a future event having no immediate connection with the wrongful act complained of."

Counsel for *Flora* say that the government thus has reversed its position of 1934 on the time of accrual of the cause of action and the running of the limitation period on refund claims, a question for this Court to decide, and applicable here.

2.

In treating with *United States* v. *Price*, 263 F.2nd 382; certiorari granted, 359 U.S. 988, respondent says under the assumption that the Ninth Circuit decision is correct

that it "has no application to the assessment of that portion of the tax ($225,000) *voluntarily* paid by the taxpayer prior to its assessment." The Government made this same point before the lower court, which was answered by petitioner to the apparent satisfaction of the Court of Claims as "voluntary payment" was not mentioned in the decision, except to say that was defendant's contention. (Pet. 1-a) Section 56 of the 1939 Internal Revenue Code is the only provision which defines a voluntary payment—"Voluntary Advance Payment.—A tax imposed by this chapter, or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment." Section 321 is related solely to installments—prescribed payments, and is inapplicable here. (Br. 7-8). Petitioner, in its Reply Brief dated June 25, 1958, pp. 13-15, presented the answer on this point. We correctly said that Sec. 56(d) was a provision under Chapter 2, Income Tax, applicable only to income tax payments, and there was *no date prescribed* for the payment here made on account to stop interest, a legal consideration: that payment was conditional, not voluntary. Prior to enactment of Section 6213(b) (3) of the 1954 Code, the only means by which a taxpayer could stop interest by paying so much on account, was to execute an effective Sec. 272(d) Waiver *after* final notice of a deficiency. This petitioner did not do. That is the case of *U. S.* v. *Price*, *supra*.

Under 2, page 9 of respondent's brief, it is argued that Section 271(a)(1) indicates that "a valid tax may be collected without assessment." Sub-division (a)(1)(B) of Sec. 271 in modification of the premise "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of . . . . ," "the amounts previously assessed (or collected without assessment) as a deficiency, over . . . . ." On August 14, 1947 when petitioner paid the $225,000 in

question, there was no amount outstanding *as a deficiency*. There was a *proposed* deficiency shown by a revenue agent's report of which petitioner had been advised by letter dated July 23, 1947. That was all. There was no defined or determined deficiency. *Dubuque Packing Company* v. *U. S.*, infra, p. 10. Consequently, the amount remitted to the Collector on August 14, 1947, was not a collection of a part of a deficiency without assessment as the statute means.

Also, respondent's argument on "self-assessment" (Br. 9-10) is unsupported as on August 14, 1947, there was no defined or determined tax liability in any amount. The "self-assessment" in *Hill* was based on taxpayer's original return.

Respondent's brief, page 9:

Manning v. *Selby Tube & Box Co.* (Br. 9, footnote 5) is not in point here. It involved a question of whether interest on a prior deficiency should be abated because of the effect on net income of a carry-back operating loss, a provision of the 1942 Revenue Act which is non-retroactive.

Spies v. *United States* (Br. 9, footnote 5) also not in point, was a criminal case involving Section 145(b) of the 1936 Revenue Act, which deals with a willful attempt to evade or defeat a tax, and in that case the question of a certain charge to a jury.

Helvering v. *Mitchell* (Br. 9, footnote 5) involves Section 146(b) of the 1928 Revenue Act, 26 U.S.C.A. Sec. 145(b), 293(b), and is not in point here, nor does it touch on the point to which it is keyed.

3.

Lehigh Portland Cement Co. v. *United States* cited by respondent (Br. 8-10) and *alone* cited by the court below in

justifying its decision, involves a question which herein arises only indirectly if at all, and is not in point. In that case the Commissioner made what is termed a premature assessment of tax after sending taxpayer a 60-day final notice of deficiency. Taxpayer did not timely avail itself of the right to enjoin the Commissioner from making the assessment. The Court held it had slept on its rights and denied relief. In this case petitioner was not even advised of the $225,000 assessment of October 10, 1947, until April 19, 1948. This date is derived from the period for which interest on $1,125.00 was refunded. (Pls. Ex. 25, Pet. 10-a), (Pet. 4-a, 10-a, 11-a). This is an admitted fact (Br. 5). The Commissioner and petitioner consummated their agreement to $308,493.20 as the adjusted excess profits tax deficiency on April 27, 1948. Petitioner signed the Form 874 agreement (Sec. 272(d) Waiver) on April 22, 1948. It would be conscienceless to hold that petitioner slept on its rights by not seeking to enjoin the collector on the unjustified, illegal assessment made six months before it was informed of it and while petitioner was in the last stages of making an agreement with the Commissioner as its tax liability or tax debt. The application of the doctrine of laches by the court below in such a case is indeed thoughtless or an extreme injustice. Petitioner had no right or occasion to investigate the Commissioner's private records to keep abreast of what he was doing with its $225,000 which it had a right to assume, by the endorsement on its check, was still being held on April 22, 1948 in the Collector's Unclassified Collection account, his Collection Suspense Account. *John Nitsos* v. *United States*, U.S. Dist. Ct. (Ala. So. Div. April 1958—unreported—58-1 U.S.T.C. par. 9491, 1 A.F.T.R. 2nd, 1543. Petitioner did not waive its right to a final notice of deficiency (Sec. 272(a)(1)) under authority of *Lehigh* as the court below indicated.

4.

The new question raised by respondent's brief, upon which it is desirable to comment is as follows:

> *Was the $225,000 payment to the Collector on August 14, 1947, the payment of a deficiency in excess profits tax for the year 1944, or a payment of money on account solely for the purpose of stopping the running of interest on that amount, pending a determination of the correct amount of petitioner's liability placed in contest of which the Commissioner's representatives, the Collector and Revenue Agent in Charge were concurrently advised?*

Prior to the enactment of Section 6213(b)(3) in the 1954 Internal Revenue Code, the Commissioner had no authority to assess a payment made in respect of a tax as distinguished from a payment of tax, ergo, an assessment of a partial payment of a proposed deficiency was invalid, unless the tax was in jeopardy, or covered by a Sec. 272(d) Waiver. The assessment of October 10, 1947, was invalid because the $225,000 was a payment *in respect of* a deficiency in tax to be thereafter determined and which was not determined nor defined until after the Protest was decided upon by the Commissioner in April 1948. The case of *Hill* v. *United States*, 263 F.2nd 885 (C.A. 3) cited by respondent (Br. 8) favors petitioner's position. The Court's conclusion in respect of the payment there involved was:

> "The difference then, is whether a taxpayer gives the Government money in discharge of his tax debt or gives it money to stop interest and penalties while he and the Government contest *what the debt is to be.* * * *" (Emphasis supplied)

In *Rosenman* v. *United States*, 323 U.S. 658, also cited by respondent, this Court was quoted in *Hill*, supra, to have spoken as follows in describing such a payment as was made by petitioner in this case:

> "They are, as it were, payments in escrow. They are set aside * * * in special suspense accounts established for depositing money received when no assessment is then outstanding against the taxpayer * * * Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due."

Quite plainly "what the debt is to be" means a definition of *items* and the *amount* of the debt or liability. In this case that *could not be* and *was not* defined or ascertained until the Protest was decided. The $225,000 was paid on a disputed account for 1944. No items of adjustment to equal or define such payment were admitted. There was no "remainder of the adjustments" protested in amount. (Br. 5) The Protest covered 1942, 1943, and 1944 taxes. There was no "account stated" nor an "account settled."

Petitioner by the terms of its communications of August 14, 1947 did not admit liability for $225,000 of the proposed deficiency, for the reason that such payment did not result in an "account stated" or an "account settled." Certain well-settled principles apply to an "account stated." Among them are that the parties must agree on the balance struck, and that where there is a dispute and disputed items between the parties composing the account as a whole, and the *balance due* is not admitted between them, there is no "account stated." There was such a dispute until the Protest was disposed of. *Mertens-Law of Federal Income Taxation*, Sec. 58 A.14, pages 40-42. See also *Words and Phrases*, showing many cited cases on the subjects of an "account stated" and an "account settled." After the dispute was settled under the Protest filed, the liability for taxes for the years 1941, 1942, 1943 and 1944 was adjusted, for Pennsylvania taxes, *other taxes under G.C.M. 25,298*[1] and

[1] This later became the third item protested.

the question of distributions in prior years out of accumulated earnings. Only then was there an "account stated." On September 2, 1948 there was an "account settled." This dispute nullifies the court's conception of an admitted liability for a deficiency in 1944 excess profits tax of $225,000 paid to the Collector on August 15, 1947 (but unapplied to a tax deficiency until August 1948). The taxes in dispute of the "net deficiency" proposed for 1944 in the amount of $316,377.04 involved an overassessment of income tax of $102,816.60 and a deficiency in excess profits tax of $419,193.64. We are concerned with this asserted deficiency. A "net deficiency" is not a statutory deficiency. (Sec. 271.)

As there was no admitted liability for excess profits tax, the $225,000 constituted a payment in respect of a tax and one made on the estimated future determination which was to be settled under the Protest. Under the 1939 Code payment on open account in respect of a tax is not the payment of a tax and is not assessable. It would follow that, contrary to the court's decision, the Commissioner, in the absence of a Code Sec. 272 (d) waiver giving the Commissioner authority to assess and collect the $225,000 as a tax, could not legally make an assessment of tax.

The Court below erroneously construed the payment of $225,000 to be a *deficiency* in excess profits tax for 1944. (Resp. Br. 12 defining Sec. 271.) Petitioner's letter of August 14, 1947 (Appendix, infra, p. 18a) said it was paying the $225,000 on account (and against) the "net deficiency" of $316,377.04. No place in the 1939 code is there a provision covering a "net deficiency." A "net deficiency" is not a tax and is not assessable as such. This, moreover, makes it doubly clear that the $225,000 was what it was intended to be, the payment of an estimated amount on the 1944 disputed account. It eventually became part of the settled

deficiency of $308,493.20, but was not a "deficiency" when paid on August 14, 1947. (Resp. Br. 9)

In *Dubuque Packing Company* v. *U. S.*, 126 F. Supp. 796, aff'd 233 F.2nd 453 (8 Cir.), the lower court at 799 said:

> "It is evident from the cases that not every transfer of money by a taxpayer to a Federal tax authority will constitute a 'payment' under the laws relating to Internal Revenue. The question here presented is as to the status of a transfer of money to a Federal tax authority as a 'payment' within the statute of limitation contained in Section 322(b)(1). As heretofore noted, a 'return' or 'payment' will start the statute running. To do so the return must define the tax obligation or give sufficient information to define the tax obligation. It would seem that in construing the provisions of Section 322(b)(1) in connection with a 'payment' the same policy should be recognized and the same reasoning used as is recognized and used in construing the provisions of that Section in connection with a 'return'. In the case of a proper tax return, the return itself defines the tax obligation. However, in the case of a money transfer the transfer itself does not define the tax obligation. Hence some further act is necessary. A money transfer to a Federal tax authority (*regardless of the original reason for the transfer*) should start the statute of limitation running on the date that the *tax obligation becomes defined*. On this date the transfer becomes a 'payment' because from this day forward the taxpayer has a fair opportunity to determine whether he has a claim for refund. * * * This is also the holding in the case of *Thomas* v. *Mercantile Nat. Bank*, 5 Cir., 1953, 204 F. 2d 943. In that case the Court said, 204 F. 2d at page 944:
>
> > 'It would be illogical to hold * * * that the statute of limitation began to run against a claim for refund before the deficiency itself came into existence and *before the fact that there was an overpayment, and its or the amount thereof, became ascertainable.*" (Emphasis supplied)

The Agent had determined the *amount* of the *proposed* deficiency in excess profits tax of $419,193.64. The Commissioner had not determined there was a deficiency under Sec. 272(a)(1) of the Code. The deficiency agreed to by waiver signed by taxpayer on April 22, 1948, accepted for the Commissioner on April 27, 1948 was $308,493.20. The *net deficiency* in tax for 1944 was reduced to $249,576.01 from $316,377.04.

The case of *Leavyt Corp.* v. *Commissioner* (2 Cir.) cited by respondent (Br. 8) also favors petitioner's position for the reason that its letter of August 14, 1947 recited that it was the intention to pay the $225,000 *on account* and that sum was an estimate of what it might have to pay of the *net deficiency* proposed, amounting to $316,377.04 which was adjusted to $249,576.01. Under *Leavyt* there would have had to be an agreement between the taxpayer and the Commissioner to have assessed the $225,000 as an asserted tax. There was no agreement for assessment for 1944 or 1945. Neither was the Commissioner under a duty to accept the remittance as a payment of tax in full or *pro tanto*, because of the extended dispute over the liability and amount of the debt. The Commissioner, by authority of the documents (See Appendix) had no authority to assess a tax on the estimated payments on account for either 1944 or 1945. He did not do so for 1945. The 1944 assessment prior to final determination of liability or tax debt cannot be logically or legally justified or explained. It apparently was an administrative "bloomer," as there was likewise an expected deficiency for 1945. Petitioner so admitted. (Appen. p. 18-a).

For sake of clarification, petitioner presents in the Appendix hereto, the documents, reproduced in full, which the court below analyzed and interpreted in making its findings and conclusions of law on the question that petitioner had thereby waived its right to a final notice of

deficiency prior to April 22, 1948, as to the $225,000. The documents are listed and described as follows:

Appendix

Petitioner's letter of August 14, 1947, enclosing four (4) checks received by Collector of Internal Revenue, Chicago, on August 15, 1947. (Infra p. 18-a)

Receipt of Revenue Agent's Report signed by petitioner and dated August 14, 1947, received by the Internal Revenue Agent in Charge, Chicago, on August 20, 1947, together with a copy of the letter to Collector dated August 14, 1947, and Protest of August 19, 1947. (Infra, pp. 16-a—19-a)

Protest dated August 19, 1947, received by the Revenue Agent in Charge, Chicago, on August 20, 1947. (Infra, 19-a)

The findings of the court below contain reference to and quotations from all of said documents. Mere quotations from such documents contained in the findings and opinion of the lower court emasculate the true meaning of these communications and weaken petitioner's position in this case by asserting conclusions of law as facts. This Court is respectfully urged to carefully read the documents in detail as listed above.

Petititoner is willing to admit that these communications to the Collector and Agent in Charge expressed the hope that its tax liability for the years 1941, 1942, 1943, 1944 and 1945 would be settled as a result of its Protest for 1942, 1943 and 1944. (Appendix, infra, p. 19-a.) The Protest directly affected 1942, 1943 and 1944, although the remittances made to the Collector were applicable to 1944 and 1945. The outcome of the tax liability for 1945 was related to the controversy over the prior years as was stated in letter to the Collector.

The remittance for 1945 of $150,000 mentioned in the same letter to the Collector was intended by petitioner to be construed by the government in the same manner as for 1944. Prior to the payments for 1944 and 1945, petitioner had declined to sign Form 874, a Sec. 272(d) waiver of the restrictions on assessment and collection of tax under Sec. 272(a)(1) in response to the Agent's letter of July 23, 1947. (Pet. 8-a, Br. 4.) On August 14th petitioner told the Collector that it was filing its Protest, enclosing the four checks as payments on account for tax expected to be determined in the future as deficiencies, with interest to date with the intent to stop further interest, as it then thought it could do, without signing a Sec. 272(d) waiver. Petitioner admits it was in error on the interest stoppage in point of time. After assessing the $225,000 for 1944 on October 10, 1947, without knowledge to petitioner until April 19, 1948 when the interest of $33,750 for 1944 was reduced by $1125.00, petitioner and the Commissioner, under date of December 16, 1947 agreed by consent (Form 872) to extend the statute on assessment and collection of 1944 taxes until December 31, 1948. After the contest under the Profest was settled, petitioner was asked to and did sign a Form 874, Section 272(d) waiver of the provisions of Sec. 272(a)(1) in the amount of $308,699.83, transmuted to $308,493.20, regardless of the prior $225,000 previously assessed, which in August 1948 was applied to make out a government bookkeeping assessment entry of $83,493.20. These are facts set forth in the findings of the lower court.

If these admitted facts do not show petitioner to have clearly expressed its intention to have the deposit with the Collector of $225,000 on August 14, 1947 put to its credit pending the outcome of its Protest, which, when it was filed, was unpredictable as to the future liability determinable,

then petitioner is at a loss to further explain the true situation. In August 1947, petitioner, in effect said to the representatives of the Commissioner: "We will not sign away our rights under Sec. 272(a) until the controversy under the Protest is ended to our satisfaction." On April 22, 1948, petitioner signed the government form submitted, which provided, as follows:

> "Pursuant to the provisions of Section 272(d) of the Internal Revenue Code and or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code and or the corresponding provisions of prior internal revenue laws as amended are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax: . . ."

The respective deficiencies for 1941, 1942, 1943, and 1944 were thereupon listed, below which were given the amount of the overassessments of tax (income tax and excess profits tax, respectively for 1944 and 1941. When the form was received by the Agent, the controversy was formally closed.

The initial irregular step in the whole procedure was the premature, invalid assessment of the remittance of $225,000 on October 10, 1947, and as is shown, the Commissioner thereafter acted as though the remittance had not been assessed, indicating that there was no justification for the assessment in the first place. Petitioner, contrary to what the court below said in its opinion (Pet. 5-a, 6-a), did not state or otherwise indicate that it did not care to contest the remittance of $225,000 as a liability or debt for taxes, but rather conveyed its intentions as above outlined.

Whether or not the sum remitted remained in the Collector's Suspense Account would not change the effect of petitioner's intentions. Under the 1939 code it was illegal

to impose a tax by assessment where a remittance is one in respect of a tax, unless and until a Section 272(d) waiver was executed by a taxpayer. Cf. *Thomas* v. *Mercantile National Bank at Dallas*, supra. Under the circumstances, the $225,000, with interest of $32,625, assessed on October 10, 1947, may be honored herein as a constructive assessment on August 13, 1948 when it was used to reduce the deficiency which came into existence by agreement of April 27, 1948. The $1125 interest refunded should be added.

In Conclusion

In the light of the foregoing, petitioner believes that the petition should be granted, and further, that petitioner would, upon the record, be entitled to summary judgment, reversing the lower court.

Respectfully submitted,

SPAULDING GLASS
135 South La Salle Street
Chicago 3, Illinois
Attorney for Petitioner